

**RECENT DECISION ON CCP §998 OFFERS MADE AT THE  
TIME THE COMPLAINT IS SERVED**

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In a decision certified for partial publication, the Third Appellate District affirmed the trial court's denial of defendant's motion to tax the costs plaintiff claimed he was entitled to by virtue of his CCP section 998 offer. Barba v. Perez (August 28, 2008) 08 C.D.O.S. 11538, involved an action for personal injury in which plaintiff served his 998 offer to settle along with the summons and complaint. Defendant and appellant Perez did not respond to the 998 offer, and rebuffed plaintiff's pre- and post-offer efforts to settle. The appellate court said the underlying facts showed the trial court acted within its discretion to deny defendant's motion to tax. In dissent, one justice wrote that a 998 offer served with a summons and complaint and due before the answer is due is "per se unreasonable;" the majority disagreed and affirmed.

In Barba, plaintiff and defendant were well known to one another. Plaintiff was injured when a refrigerator he was moving with one of defendant's agents fell on his foot. As a consequence, he suffered a broken foot and lost time at work. Prior to initiating litigation, Barba had tried to resolve the matter informally with Perez. When Barba's written requests for reimbursement of his medical expenses and lost wages "fell on deaf ears," he filed suit. At the time he served Perez with the summons and complaint, he also served him with a CCP section 998 offer to compromise in the amount of \$99,999.99. The offer was similarly ignored and the matter went to trial.

At the conclusion of trial, the jury found defendant was liable for his agent's negligence. It also determined plaintiff's medical expenses were in excess of \$75,000 and his lost wages were \$42,000. Based on the jury's answers to the special verdict, the trial court entered judgment in favor of Barba and against Perez in the amount of \$117,053.42. After that, Barba filed a costs memorandum which included prejudgment interest and expert witness fees pursuant to CCP section 998. Perez made a motion to tax those costs on the basis they were not recoverable, but the trial court denied this aspect of the motion to tax and the court of appeal affirmed.

Perez argued that the "trial court abused its discretion in denying his motion because at the time Barba served him with the section 998 offer, he 'had absolutely no basis to determine if the offer was reasonable.'" The appellate court observed that a determination of the reasonableness of a 998 offer lies within the discretion of the trial court, and will not be reversed on appeal absent a clear abuse of that discretion.

The appellate court noted that one way a trial court may determine whether an offer to compromise is reasonable is to look at the amount of the 998 offer to settle “compared to the judgment ultimately recovered. (Cite.) Where the offeror obtains a judgment more favorable than its offer, the judgment constitutes *prima facie* evidence showing the offer was reasonable.” Here, Perez was not able to rebut this presumption of reasonableness. “Indeed, the offer came remarkably close to the amount of damages ultimately awarded by the jury.”

The court also observed that Barba’s actions were consistent with the purpose of section 998 to “encourage pretrial settlements and avoid needless litigation.” The appellate court could find nothing in the record that suggested the trial court abused its discretion in denying Perez’s motion to tax.

The appellate court also rejected the position urged by a dissenting justice—that “any section 998 offer served by a plaintiff before the answer is due is *per se* unreasonable, ostensibly because the defendant has not had an adequate opportunity to conduct discovery on the issue of damages.” Because judges have great discretion in awarding costs under section 998, they can take into consideration the reasonableness of the parties under the circumstances. Here, the parties knew one another and defendant knew what plaintiff’s injuries and damages were. However, even when that is not the case, a defendant who needs additional time to investigate the merits of a section 998 offer made before there has been any discovery can ask plaintiff for some informal discovery in order to evaluate the offer, or ask for an extension of time to respond to the offer during which investigation can be conducted. If plaintiff’s counsel refuses these typically reasonable requests, that would be something the trial court could consider when determining whether to award costs and expert fees under section 998. If a plaintiff attorney stonewalled defense counsel, for example, “[u]ndoubtedly, such obstinacy would be viewed as potent evidence that plaintiff’s offer was neither reasonable nor made in good faith.”

In addition, while section 998 sets out a deadline by which an offer to compromise must be made (no later than 10 days before trial), the “Legislature did not impose any *minimum* period that must elapse following commencement of suit for service of a valid section 998 offer. We respect the Legislature’s choice in this area and refuse to impose a judicial ‘waiting period’ for serving an offer to compromise.” (Emphasis in original.)

This is an important decision. Even though a section 998 offer is served with a complaint and summons, and is due before a responsive pleading, Barba v. Perez makes it clear that these early 998 offers must be treated as seriously as those made after considerable discovery has taken place. All efforts to seek extensions of time to respond or for informal discovery so that the offer can be evaluated should be memorialized in writing. In the event plaintiff’s counsel refuses to cooperate or provide information necessary to

the determination of whether the offer should be accepted. Counsel will then have documentary evidence of efforts made to investigate the offer, and the unreasonableness of opposing counsel to facilitate the investigation. Similarly, defense counsel who make section 998 offers very early in litigation (such as with a responsive pleading, or shortly thereafter) may also be obliged to comply with informal discovery requests or the granting of an extension if they want to be viewed as reasonable by a trial court considering an award of costs and expert fees at the conclusion of trial.